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801.10



By UPS



March 4, 2004

Michael Verne
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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FEDERAL TRADE
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PREMERGER NOTIFICATION
OFFICE

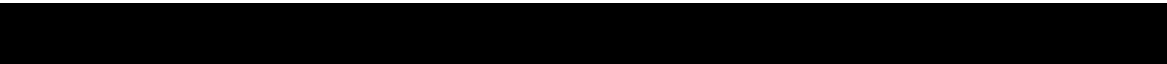
Re: **HSR Phone Inquiry**

Dear Mike:

This letter confirms our telephone conversation last week in which I asked you whether an acquiring entity would satisfy the size of person test under the following facts:

This is an acquisition by a newly-formed LLC of voting securities in a company which is a wholly-owned subsidiary of A. The LLC, which is its own UPE, does not have a balance sheet. The members of the LLC each have previously received bridge notes from A which remain unpaid.¹ The total amount due under these notes is approximately \$60 million. Essentially, the members of the LLC will be contributing their outstanding notes to the LLC, and will receive membership interests in the LLC which are proportional to the amount of the notes they held. These notes, along with a small amount of cash (also contributed by the LLC members) that will be used for the acquisition, will be the sole assets of the LLC. The total consideration for the acquisition is approximately \$65 million. Of this amount, approximately \$60 million will be "paid" through the cancellation of the bridge notes and forgiveness of fees due under another loan facility to A. Only a small amount, less than \$5 million, will be paid to A in cash.

¹ As we discussed, this transaction would not be exempt under § 802.63 because it appears that the loans were extended after it became publicly known that A was experiencing financial problems.



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My question to you was whether the notes that are being contributed to the newly-formed LLC would be considered to be assets of the LLC so as to satisfy the \$10 million size of person test, or whether they would be considered in the same manner as cash which is to be used for the acquisition, so that, pursuant to § 801.11, the LLC would not be deemed to have assets greater than \$10 million.

You advised me that these notes would be treated in the same manner as cash to be used by an acquiring person as consideration for the acquisition of voting securities, and, therefore, that the LLC will not meet the size of person test under these facts.

I also asked you how the size of the transaction would be valued if, in the alternative, instead of having all of the outstanding notes cancelled as in the prior example, A assigned some portion of the notes to the sub, and the LLC acquired the sub with the portion of the notes assigned to the sub remaining outstanding. For example, A would transfer approximately \$55 million of the notes to the sub and as consideration for the voting securities of the sub, the LLC would cancel the remaining \$5 million of notes owed by A as well as approximately \$500,000 in outstanding fees under another loan facility and make a cash payment to A of approximately \$4.5 million. The result of this would be that following the acquisition of the sub by the LLC, the LLC would have paid consideration of approximately \$10 million in cash and debt cancellation, and hold the voting securities of a company with approximately \$55 million of debt. You said that you did not see any reason why this structure would not be governed by the standard rule, which is that when valuing the size of an acquisition of voting securities, the value of the debt held by the acquired entity is not included in the acquisition price. Thus, under this second scenario, the acquisition price would be deemed to be approximately \$10 million and would therefore fall below the HSR size of transaction threshold.²

² The figures I used as examples in our telephone conversation were slightly different, but the amounts in this letter more accurately reflect the current thinking regarding the proposed structure of this acquisition.

[REDACTED]

[REDACTED]

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If I have not accurately reflected the substance of our conversation, or if you have any further questions, please let me know.

Thank you for your assistance.

Sincerely,



AGREE -
B. Michael Verne
3/8/04

